FILE COPY.

Office Supreme Court, U. S.
FILED.
JAN 23 1907
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 482.

THE UNITED STATES, APPELLANT

vs.

EDWIN M. KEATLEY, APPELLEE.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR EDWIN M. KEATLEY.

FRANK B. CROSTHWAITE,
Counsel for Appellee.

In the Supreme Court of the United States.

OCTOBER TERM, 1906

THE UNITED STATES,
APPELLANT

vs.

EDWIN M. KEATLEY,
APPELLEE.

Docket No. 482

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR EDWIN M. KEATLEY.

The case is fairly stated in brief of counsel for appellant. The appellee was clerk of the United States Court for the Southern District of West Virginia.

An indictment by the grand jury in that District included several defendants. On motion by counsel for the defendants the court granted a severance for each defendant and each defendant was separately designated on the docket and a separate jury was empanelled and costs were taxed separately, and the clerk charged in his accounts for fees earned, the proper docket fee in each of said separate cases.

The accounting officers allowed one docket fee for all of the cases and disallowed all the other charges on the theory that because all the defendants had been indicted in *one* indictment there was only *one* "cause," hence only one docket fee should be charged for all of the entries made in all of the cases.

The clerk brought suit in the Court of Claims to have the legality of the charge judicially determined. The court decided in effect that the action of the court in granting a separate trial for each defendant created a separate cause and that the charge of a docket fee in each case was lawful. From that decision appeal was taken to this court.

Counsel for appellant contends that the word "cause" as used in the fee bill is a technical term and its significance should be restricted to the "indictment" returned by the grand jury, and an indictment so returned, forms the basis for the charge of a docket fee in any "cause" even though several different persons were included therein.

It is admitted that only one docket fee is chargeable where there is only one trial but in the case at bar the court granted a separate trial for each defendant and a separate designation on the docket was given to each defendant and entries made on the docket of all the proceedings in each case in court respectively.

For the purpose of determining what fees shall be charged by a clerk of a court for any specific service performed it is contended by the appellee that the word "cause," as used in the fee bill, and applicable to this case, should be given a broader and more liberal construction than that given by the appellant. In other words it is contended that the word "cause" as applied to this case was intended to cover the entire proceedings in a case including the trial from beginning to the end.

The three clauses in the fee bill (Paragraphs 10, 11 and 12, Section 828, R. S.) providing for docket fees, furnishes a graduated fee of three dollars, two dollars and one dollar respectively, according to the amount of work done in keeping the dockets and indexes in a cause. It would therefore seem that it is intended that the clerk of the court who is working under a system of fees is to be paid according to the amount of labor performed.

Counsel for the appellant thinks not, but on the contrary that he should have only one docket fee not to exceed three dollars even though a hundred persons had been jointly indicted, each of whom, being separately tried by order of the court, and separate docket pages kept for each defendant under a separate designation or caption. Such a theory would consume almost the clerk's entire time without any compensation in excess of the three dollars.

This item depends entirely upon the legal significance of the word "cause" in the law cited, supra.

Counsel for the appellant contends that the indictment is the "cause." Not so, however. The indictment is merely the means or vehicle by which the defendant is made acquainted with the offense with which he is charged. There may be a "cause" where no further proceedings are had than the indictment, but it is still a "cause" during trial including judgment and the sentence. That is what constitutes a "cause."

It is believed that the law providing fees for keeping dockets was intended to be construed so as to give such a fee to the clerk as would reasonably compensate him for services for making docket entries, indexes, etc , for each case tried in court.

The reasons given by the Court of Claims (Record, page 9) to the effect that if there was a separate trial ordered by

the court for each defendant there was a separate "cause" and the clerk is entitled to a separate docket fee for each cause or trial, appear to be sound and just and upon that construction of the law the appellee rests his case.

There appears to be no dispute as to the facts in this case. Several persons were indicted under one indictment and upon motion by counsel for defendants for severance, the court granted a separate trial for each defendant.

The fact that the court granted the motion upon proper grounds shown into court, is not disputed. The appellee separately designated each defendant on the docket and necessarily entered under each separate designation or caption all of the proceedings in each case respectively.

Counsel for the appellant makes the following statement in his brief :

> "It was not within the province of the trial court to make more than one cause by granting separate trials to the individuals thus jointly indicted."

That statement raises the issue in this case and an answer to the following questions might determine the matter.

Did the court, by granting a severance for each defendant, create a separate cause, having in view the right of the appellee to charge a separate docket fee for making entries on the docket in each of the said separate cases respectively?

The following authorities are directly in point :

After severance the records in the several cases become entirely distinct and to all intents and purposes as though the defendants were charged in separate indictments.

State v. Rogers, 6 Baxt. (Tenn.) 563.
Noland v. State, 19 Ohio 131.

Where an order of severance is made it is equivalent to dividing the cause into a number of distinct actions.

Bryan v. Spivey, 106 N. Car. 99.

Where severance is had one defendant cannot rely upon anything in the record of the trial of another defendant as *Res Adjudicata* in his own case.

Eikenberry v. Edwards, 71 Iowa, 82.

Where severance is granted separate judgments become necessary. It appears, therefore, that the granting of a severance does constitute separate causes or cases and if it shall be so decided then the appellee is entitled to his separate fee for keeping separate dockets and indexes in each of the several cases thus created and that the Court below was not in error.

The second error assigned by appellant appears to be based upon the theory that no matter what is entered in a book which may bear the mark or label "docket" the entry therein must necessarily be a "docket entry" and is covered by the docket fee of one, two and three dollars for "keeping dockets, indexes, etc."

In the case at bar on which appeal is taken, the appellee entered all of the material features of the judgments of the court in criminal cases in compliance with the rule of court, which reads as follows:

> "The clerk of this court is directed to keep a judgment docket wherein shall be *recorded* abstracts of all judgments rendered in cases wherein the United States is a party. Said Judgment Docket shall contain:
> The number of the case.
> The date of the indictment.
> The names of the parties.

The amount of the judgment.
The amount of costs.
The date of the judgment.
When docketed.
The amount paid.
The disposition of the funds and any additional matter, which the clerk may deem pertinent."

For such services the appellee made a charge of fifteen cents per folio "for making a record" as provided by Section 828 R. S., and the charges were allowed by the Auditor and paid, and at a later time the Attorney General asked the Comptroller of the Treasury to revise said accounts on the theory that such charges were "docket entries" and were covered by the fee for "keeping dockets, indexes, etc."

The Comptroller's decision of January 26, 1904, holds that the entries constituted the making of a permanent record and that the charges were lawful.

Subsequently the clerk instituted a suit in the Court of Claims for other fees which had been disallowed by the accounting officers and in defending said suit the charges involved in this particular item were set up by counsel for the United States as a counter claim and the Court of Claims overruled the counter claim, from which action this appeal is taken.

Counsel for appellant again places a restricted construction on the law providing fees for services of clerks of court. The law, Section 828, provides fees of three dollars, two dollars and one dollar for "keeping dockets and indexes."

In all United States courts there are several different dockets and indexes kept. For instances, the "trial docket," the "criminal docket" the "civil docket."

There are also "execution docket," the "writ docket" and the "process docket."

The entries made in the dockets which are covered by the docket fee, are the entries of fact under each case or caption, that a certain proceeding was had, as for example the entry in a case docketed in a criminal docket, following the caption or designation of the case, would be:

Warrant of arrest issued.
Subpoena issued for A, B, etc.
Warrant returned and filed.
Subpoenas returned and filed.
Verdict guilty filed.
Judgment and sentence entered.

Such are the class of entries which would be covered by docket fee.

The entries made which are the subject matter of this item were not such entries of fact. They were entries which constituted a permanent record.

The very fact that the rule of court cited, supra, directs that the judgment shall be "*recorded*" shows conclusively that the entries constitute the making of a record.

Counsel takes the technical ground that because the entries of all the material features of a judgment as recited in detail above, were made in a book which was marked "Judgment Docket," the docket fee covers all entries made therein of whatsoever character.

If the appellee had entered in the Criminal Docket the following words, "Defendant convicted, judgment and sentence entered," such entries are evidence of the fact that such proceedings have taken place. But the appellee claims that the entries made by him were not mere memoranda, not contemporaneous entries on the docket, neither are

they "services on trial or argument of the cause" within the meaning of the fee bill.

Again it is claimed by appellant that the "Judgment Docket" so-called, containing entries made in pursuance to the order of the court, supra, is a "docket" within the meaning of that clause of the fee bill providing fees "for keeping dockets, indexes, etc."

The appellee claims that it is not such a docket, that it might more properly be marked and known as a "Judgment Record," but it is immaterial what it is marked or labeled, the fact remains that the entries made by the appellee in the "Judgment Docket" constituted a permanent "record" for the making of which the fee bill provides a fee of fifteen cents per folio.

Respectfully submitted,

FRANK B. CROSTHWAITE,

For Appellee.